No. 88-6613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD BOYDE,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the capital sentencing proceeding in petitioner's case violate Eighth and Fourteenth Amendment requirements where the California statutory list of 11 exclusive aggravating and mitigating factors with which the jury was instructed limited the sentencer's consideration to any other mitigating circumstance "which extenuates the gravity of the crime" and thereby precluded petitioner's jury from giving mitigating effect to evidence of his character and background not immediately related to the circumstances of the crime in determining whether a sentence less than death is the appropriate punishment?

2. Did the Eighth and Fourteenth Amendments permit the trial judge to instruct petitioner's penalty phase jury that, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death," and does such instruction require reversal of the resulting capital sentence because it precluded the jury from making a reasoned moral judgment that death rather than life imprisonment without parole was the proper sentence in his case.

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OPINION BELOW

The opinion of the Supreme Court of California affirming the judgment of conviction and sentence of death is reported in *People* v. *Boyde*, 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25 (1988). It is set forth in the Joint Appendix (hereafter, "J.App.") at pages 40-105.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(3). The judgment of the Supreme Court of California was entered August 11, 1988, and on November 9, 1988 that court made its order denying rehearing. A timely petition for writ of certiorari was filed on February 7, 1989. Certiorari was granted on June 7, 1989. The Supreme Court of California has stayed petitioner's execution pending final determination of the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, which provide in relevant part:

> "Excessive bail shall not be required . . . nor cruel and unusual punishment inflicted."

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

This case also involves California Penal Code §§ 190.2 and 190.3. These lengthy statutes are set out verbatim in Appendix D of the petition for writ of certiorari.

STATEMENT OF THE CASE

This case presents two questions under the Eighth and Fourteenth Amendments to the United States Constitution. Each concerns limitations expressed in the trial

court's instructions—repeatedly reinforced by the prosecutor's misleading statements—which petitioner has challenged as impermissibly circumscribing the role and scope of the jury's determination as to whether a sentence of death or life imprisonment without parole was appropriate in his case.

The focus is on two jury instructions purporting to apply Cal. Penal Code § 190.3, found in 1 California Jury Instructions, Criminal (4th ed. 1979) at 335-336 (hereafter "CALJIC 8.84.1") and 337-338 ("CALJIC 8.84.2"), both of which are no longer in use in California sentencing proceedings. See now 1 California Jury Instructions, Criminal (5th ed. 1988) at 409-410 (CALJIC 8.85) and 416-417 (CALJIC 8.88). In two cases decided following petitioner's trial, constitutional challenges to the same instructions as were given in his case resulted in substantially revised language that has been used in instructing California juries in all subsequently-tried capital cases. See *People* v. *Easley*, 34 Cal.3d 858, 878, n. 10 (1983) (disapproving former CALJIC 8.84.1)[1] and *People* v. *Brown*, 40 Cal.3d 512, 544-545, ns. 17 & 19 (1985) (acknowledging confusion in CALJIC 8.84.2 and approving proposed revision).[2] Nevertheless although petitioner's case was tried under the previous instructions,

[1] The complete instruction from CALJIC 8.84.1 given at petitioner's trial is set forth in Appendix A, along with the revised version now numbered 8.85 taken from the 1988 edition of CALJIC (which includes the language adopted in conformance with *Easley*).

[2] The complete instruction from CALJIC 8.84.2 given at petitioner's trial is set forth in Appendix B, along with its 1988 revised form renumbered 8.88. The proposal noted in *Brown*, 40 Cal.3d at 544-545, n. 19, was adopted verbatim and is carried over verbatim in the present version.

the California Supreme Court sustained his sentence of death.

Petitioner Boyde's case presents quite graphically the constitutional dilemma that the subsequent modification of these two instructions was expressly designed to correct. The first—subdivision (k) factor of § 190.3—explicitly limited the sentencer's consideration of mitigating evidence to "[a]ny other circumstance which *extenuates the gravity of the crime* even though it is not a legal excuse for *the crime*" (emphasis added), thus precluding the jury from giving effect to mitigating circumstances bearing on petitioner's character or background that were *unrelated* to the crime. Virtually all of petitioner's considerable mitigating evidence fell into this category.

The second instruction implemented the directive of § 190.3 that the trier of fact "shall impose a sentence of death" if it "concluded that the aggravating circumstances outweigh the mitigating circumstances," former CALJIC 8.84.2.[3]

Under this instruction, petitioner's jury was afforded no vehicle for exercising the reasoned moral judgment as to whether death or life imprisonment without parole was the appropriate sentence. Because the prosecutor repeat-

[3] The successor instruction, CALJIC 8.88 (see Appendix B), directs that jurors "are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider" and "to determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances," and further, that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

edly emphasized to petitioner's jury the misleading view that CALJIC 8.84.2 left it no discretion under law—even if there is a "slight outweigh"—and finally, because petitioner's more than two volumes of transcript evidence of mitigating evidence plainly reinforces the risk that the death penalty was imposed "in spite of factors which may call for a less severe penalty," *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion), this instruction must be held unconstitutional under the Eighth and Fourteenth Amendments.

On September 28, 1981, petitioner and codefendant Carl Franklin Ellison (not a party herein) were charged by information filed in the Superior Court of the State of California in and for the County of Riverside (case No. CR-18348) with the crimes of murder, robbery, and kidnapping for robbery. The offenses were allegedly committed on or about January 14, 1981. Two "special circumstances"—murder during commission of a robbery and murder during the commission of kidnapping for robbery—were alleged, thus making this a capital case. Cal. Penal Code, § 190.2, subdivisions (a)(17), paragraphs (i) and (ii). Petitioner was further charged with having suffered two prior felony convictions. He alone was additionally charged in the information with the commission of robbery and kidnapping for robbery, on January 5, 1981 (these further charges are not involved in the within petition). Clerk's Transcript 1-6.

The instant offenses arose from the robbery of a convenience store in Riverside, California, after which the clerk of the store was taken to a nearby orange grove and fatally shot. The gun that probably was used to kill the victim was subsequently located in Ellison's home; it belonged to his mother. The car used to commit the robbery belonged to the Ellison family. Co-defendant Ellison

waived a jury trial; he was tried by the same judge who simultaneously presided over petitioner's jury trial in the consolidated proceeding. Both petitioner and co-defendant Ellison testified before the jury in their own defense. Each acknowledged participation in the robbery and kidnapping, but contended the other shot the victim. In Ellison's earlier statements to the police, he admitted shooting the victim himself. *People* v. *Boyde*, 46 Cal.3d 212, 222-223, 227-231 (1988).

Petitioner was convicted on all charges, as well as of the two special circumstances. The jury also made a special finding that petitioner "personally killed [the victim] with express malice aforethought and premeditation and deliberation." Ellison was convicted by the court of first degree murder and the allegations of special circumstances were found true. However, at the sentencing hearing the judge struck the special circumstances as to Ellison which permitted imposition of the more lenient sentence of 25 years to life imprisonment. 46 Cal.3d at 221, 231.

In the penalty phase of petitioner's jury trial, the prosecution presented evidence of prior offenses by petitioner, of an unexecuted plan by him to escape from the county jail during the instant trial, and concerning other misdeeds; also certain police officers and petitioner's former probation officer testified about various contacts with him. 46 Cal.3d at 247-249. The defense offered extensive testimony about petitioner's disadvantaged childhood.

Richard Boyde was born in rural Arkansas. His mother labored in the fields as a farm hand, and shared a house with 12 or 15 others. By the time he was born, his 23-year-old mother had already given birth to six children by a failed marriage. Richard, however, was illegitimate, and his father moved to Florida soon after he was born; the

father, for whom petitioner is named, was apparently later killed in Florida. RT 4487-4495.

When petitioner was four years old, it became impossible for his mother to care for him and his sister Helen. Both were sent to live with an aunt in Rubidoux, near Riverside, California. A few months later, the aunt notified petitioner's mother she could no longer keep the two children. Upon her arrival, his mother found both petitioner and his sister covered with untreated sores, apparently impetigo. When she attempted to get the children medical treatment, the doctor chased the family out of his office. Petitioner's mother stayed in California. She worked irregularly as a domestic—her education had stopped when she had to start working in the fields as a child of eight or ten—but there were many days when the family had no money for food and did not eat. By the time petitioner was about seven, his mother had remarried and their circumstances improved slightly. RT 4495-4509.

This deprived childhood, coupled with very low intelligence led him to develop a personality incapable of dealing with life's problems. RT 4325-4353, 4649-4703. Testimony by family and friends demonstrated that Richard Boyde had a good side: he was a kind husband and father, RT 4416-4426, 4612-4620; a hard worker, RT 4365; a person who is generous and pleasant to his intimates. RT 4551-4561, 4599-4600, 4618. His mother and stepfather testified to their repeated attempts to obtain counseling at schools for his evident problems, but that these efforts had been rebuffed; they explained how their poverty prevented them from obtaining the private counseling available to children who were better off. RT 4439-4448, 4520-4521. Other witnesses testified to petitioner's frustration at being unable to get a job because of his record. RT 4601-4604, 4614-4617. Dr. Offenstein, a

psychologist, gave his opinion that petitioner was not the kind of person who would deliberately go out and kill another; "he is not that anti-social." Rather, his behavior tends to be "responsive to how he feels at the immediate time." RT 3715.

At the conclusion of the penalty trial, the jurors were given an instruction setting forth an exclusive list of 11 factors to consider if applicable. The eleventh factor directed the jury to take into account: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." J.App. 34; RT 4833. However, the jurors were not instructed that they could consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See *Lockett* v. *Ohio*, *supra*, 438 U.S. at 604 (plurality opinion; emphasis and footnote deleted).

The trial court charged the penalty phase jury to "be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed," J.App. 35; RT 4836; and directed: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." *Ibid.* But the jurors were not instructed that the weighing process was a substitute for the determination of whether, in their personal judgment, the death penalty was the appropriate punishment. Nor did the court inform the jurors that they were not compelled to impose the death penalty unless—upon conducting that weighing process—they deemed death, rather than life imprisonment without parole, to be the appropriate penalty. *People* v. *Boyde*, 46 Cal.3d 212 (1988); see *id.*

252-254 (majority opinion), and compare 257-259, 265-266 (dissenting opinion).

During the voir dire examination, the prosecutor repeatedly sought assurances from the prospective jurors that they would follow and apply the law as he understood it. J.App. 8 (Juror Breeding), 9-10 (Jury Foreman Armas), 13 (Juror Warne), 14 (Juror Hart), 19 (Juror Ashe). He questioned them variously about "the strict structure" of the "list" of factors "that you are to look at in deciding whether the death penalty should be imposed," *Id.* at 9, and explained that "what you do is you take that evidence plug it into the factors, and if you find that the ones that make the crime worse, those that aggravate it, outweigh the others, you shall return a death penalty." *Id.* at 17. Throughout the lengthy voir dire process the prosecutor told the jury to "resolve the question of penalty solely on the basis of whether aggravation outweighed mitigation or mitigation outweighed aggravation, without regard to the juror's own personal view of whether death or life without possibility of parole was the appropriate punishment under all the circumstances." *Boyde, supra*, 46 Cal.3d at 260 (Arguelles, J., dissenting).

Thus the prosecutor variously described the test as "whether, when you weigh the two, do the aggravating factors outweigh the mitigating factors or vice versa. [¶] If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." J.App. 20-21. Reminding the jurors of the lengthy voir dire process and that they had taken an oath "to follow the law as it is given to you by the Court," he directed them "to go through each and every one of those factors and decide . . . is this the kind of case as I am guided by these factors that warrants the death penalty?" *Id.* at 24.

In his rebuttal closing argument, the prosecutor again focused the jury's attention on "those eleven factors that are on the board that have to guide you, direct you, and be the basis upon which you make the decision." *Id.* at 28. He told the the jury: "You are deciding the just punishment according to law. You're not deciding whether I like him, don't like him, whether it's my decision to impose the death penalty. [¶] You have been given very clear guidelines, eleven of them, to direct your decision in this case. You have taken an oath that you would be willing to do that, and that's what you have to do." RT 4823. In completing his rebuttal argument, the prosecutor reiterated his understanding of the "process of weighing": "[T]he instruction is specific on it and I don't know if Defense Counsel is inviting you not to do this, that he is inviting you to make a decision independent of what the instruction is; but, this is what your obligation is, if you conclude the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death." J.App. 30; RT 4825-4826.

The jury thereafter returned its verdict fixing petitioner's punishment as death. The trial judge denied petitioner's statutory motion to reduce the penalty to life imprisonment without the possibility of parole and entered a judgment of death against him on April 20, 1982. RT 4903-4908.

On petitioner's automatic appeal to the Supreme Court of California, a majority of four justices (out of seven) upheld petitioner's death sentence. Speaking for the majority, Justice Panelli concluded "the jury was adequately informed that the manner in which it weighed mitigating versus aggravating circumstances was in its sole discretion and that it thereby determined whether death was appropriate." *Boyde, supra*, 46 Cal.3d at 255.

The majority thus rejected petitioner's contention that the instructions misdirected the jury concerning the process of weighing aggravating and mitigating factors which the prosecutor had fully exploited during argument. Moreover, the majority opined that the three dissenting justices' reliance on the prosecutor's misleading statements "before trial to unsworn jurors during individual voir dire," to establish that the jury was misinformed of the nature and breadth of its sentencing task, reflected a "novel view, unsupported by any cited authority . . . ." 46 Cal. 3d at 254 Cf. *id.*, 259-262, 265-266 (Arguelles, J., concurring and dissenting).

The majority opinion of the Supreme Court of California acknowledged that additional errors occurred during the penalty phase of petitioner's trial, to wit:

1. The trial court erred in admitting most of the prosecutor's evidence concerning petitioner's commitment to the California Youth Authority, his poor performance on parole, his untruthfulness, his possession of stolen property, his possession of marijuana in jail, his assault on Ms. Deitzman and Ms. Smith, and his robbery of Edward Hall. 46 Cal.3d at 249-250.

2. The prosecutor erroneously argued to the jury lack of mitigation should be considered as additional aggravation. *Id.* at 255.

The majority further concluded, however, that each of these errors was nonprejudicial and therefore affirmed the judgment of death, although it did not explicitly address whether the combined effect of all the penalty phase errors prejudiced petitioner. *Id.* at 256.

SUMMARY OF ARGUMENT

I

Among the most well-established principles of this Court's capital sentencing jurisprudence is that the

Eighth and Fourteenth Amendments "require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); accord *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-114 (1982). Nor can any doubt remain that "evidence extraneous to the crime itself is deemed relevant" for purposes of assessing the defendant's "moral blameworthiness." *South Carolina* v. *Gathers*, 490 U.S. ___, ___, 104 L.Ed.2d 876, 887 (1989) (O'Connor, J., dissenting); see *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987).

Petitioner's jury was instructed to weigh a list of 11 exclusive factors to determine the penalty. J.App. 33-34. Of these, the final "catch-all" factor (k) was the only portion of the instructions that "even arguably applies to the nonstatutory mitigating factors" about petitioner's background or character, *California* v. *Brown*, 479 U.S. 538, 546 (1987) (O'Connor, J., concurring); but as it formerly read, the factor (k) instruction permitted the jurors to consider "any other circumstances" only if it "*extenuates the gravity of the crime* even though it is not a legal excuse *for the crime*." (Emphasis added.) The instructions therefore precluded the jury from giving mitigating effect to evidence of petitioner's background and character not immediately related to the crime.

The prosecutor assiduously reinforced this preclusive effect by urging that none of petitioner's mitigating evidence fit within the list of statutory circumstances and that petitioner's deprived background and good character did not extenuate the gravity of his crime. J.App. 22-23, 29. While defense counsel asked the jury to consider such evidence notwithstanding, this argument had no chance of prevailing because defense counsel's argument "cannot

substitute for [correct] instructions by the court." *Taylor* v. *Kentucky*, 436 U.S. 478, 488-489 (1978). This situation is comparable to that in *Penry* v. *Lynaugh*, 492 U.S. ___ (1989), in which mitigating evidence was presented and argued at length by defense counsel; nevertheless, limiting instructions precluded the jury from giving effect to it. See *Skipper* v. *South Carolina*, 476 U.S. 1 (1986).

In petitioner's case the consequences of curtailing the jury's power to consider mitigating circumstances were profound. He presented extensive evidence of his poverty-stricken childhood and psychological problems; friends and family members also testified to his generosity and kindness. But none of petitioner's evidence about his background and character fit any of the enumerated mitigating circumstances from factors (a) through (j) in the exclusive list on which the jury was instructed, and none of it fit within the "catch-all" factor (k) instruction because such evidence could not in any logical sense be viewed as having "extenuated the gravity of the crime." Yet those mitigating circumstances did reveal a person of worth, and so provided a reason "why a death sentence . . . should not be imposed," *Jurek* v. *Texas*, 428 U.S. 262, 271 (1976) (plurality opinion). Exclusion of such evidence from the jury's consideration thus unacceptably "risks erroneous imposition of the death sentence." *Mills* v. *Maryland*, ___ U.S. ___, 100 L.Ed.2d 384, 394 (1988).

II

Petitioner's jury was also instructed that "[i]f you conclude that aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." J.App. 35. By thus reducing the determination of petitioner's death sentence to a mechanistic weighing process, the instruction as it formerly read violated "[t]he

constitutional mandate of individualized determinations in capital-sentencing proceedings" required by the Eighth and Fourteenth Amendments. *Sumner* v. *Shuman*, 483 U.S. ___, 97 L.Ed.2d 56, 65 (1987). This Court has repeatedly recognized that the constitutional bottom line regarding the sentencer's choice of penalty is whether "death is the appropriate sentence" under all of the evidence. *Penry* v. *Lynaugh*, *supra*, 492 U.S. at ___, 57 U.S.L.W. at 4962. In this way, "'the sentence imposed should reflect a reasoned *moral* response to the defendant's background, character, and crime.'" *Franklin* v. *Lynaugh*, 487 U.S. ___, ___, 101 L.Ed.2d 155, 172 (1988) (concurring opinion) (emphasis in original). The "reasoned moral response" contemplated by the Eighth Amendment does not rest solely upon the sentencer's weighing of aggravating and mitigating circumstances against each other.

One of the matters precluded from consideration under the mandatory instruction given in petitioner's case is an assessment of the absolute weight of the aggravating circumstances—that is, how strongly the aggravating circumstances call for death as the appropriate sentence. When only the relative weight is considered, there is an unacceptable risk that death will be imposed even though the aggravating circumstances are themselves "insufficiently weighty to support the ultimate sentence." *Barclay* v. *Florida*, 463 U.S. 939, 964 (1983) (Stevens, J., joined by Powell, J., concurring). The second matter precluded from consideration by California's former mandatory sentencing instruction is the judgment, based on the totality of the aggravating and mitigating evidence, of whether death is the appropriate sentence. The Court has long made clear that the capital sentencer always retains the discretion to decide that death is not the "just or wise"

sentence, "upon a view of the whole evidence." *Winston* v. *United States*, 172 U.S. 303, 313 (1899), cited in *Woodson* v. *North Carolina*, 428 U.S. 280, 296 (1976). The prosecutor in this case, however, emphasized during the voir dire examination of petitioner's jury, that jurors might be compelled to vote for the death penalty even though, for example, "I don't think this crime deserves the death penalty . . ." J.App. 18; and his penalty phase argument repeatedly referred to the rigid framework of the law reflected in the list of 11 factors given the jurors which he maintained required the death penalty, explaining, "If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." J.App. 21.

Accordingly, neither the instructions nor the argument of counsel accurately or clearly informed the jury of the duties it must perform in order to come to an individualized sentencing decision in petitioner's case. Because California's former mandatory instruction requiring a verdict of death whenever aggravating circumstances outweigh mitigating circumstances precluded the jury from making a reasoned moral judgment that the penalty of death was appropriate for petitioner, it violated the Eighth and Fourteenth Amendments.

ARGUMENT

As the California Supreme Court acknowledged in its decision below, petitioner's jury was instructed pursuant to the former, "unadorned" versions of California Jury Instructions—Criminal (CALJIC) Nos. 8.84.1 and 8.84.2. Petitioner argued that the first of these instructions precluded the jury's consideration of mitigating evidence about his character and background not immediately related to the crime, and that the second

prevented the jury from determining whether death was the appropriate punishment under all the circumstances of his case by confining its sentencing inquiry to a mere mechanical weighing of aggravating factors against mitigating factors. After petitioner's trial, the California Supreme Court directed that both instructions be revised to cure constitutional defects in each—the first, "factor (k)" instruction (referring to subdivision (k) of Cal. Penal Code § 190.3), in *People* v. *Easley*, 34 Cal.3d 858, 878, n. 10 (1983); the second, the weighing of aggravating/mitigating circumstances instruction, in *People* v. *Brown*, 40 Cal.3d 512, 544, n. 17 (1985), rev'd on other grounds in *California* v. *Brown*, 479 U.S. 538 (1987). (See Appendices A and B for former and present forms of both instructions).

Despite the intervening correction of these instructions, a majority of the California Supreme Court rejected petitioner's claim that the "unadorned" instruction on factor (k) "may have misled the jury into thinking it could not consider evidence relating to his background and character," *People* v. *Boyde*, 46 Cal.3d 212, 251 (1988). The court also ruled against petitioner's contention that the instruction to impose death if the aggravating circumstances outweighed the mitigating circumstances left the jury without "an adequate basis on which to determine whether the death sentence is the appropriate sanction," *Sumner* v. *Shuman*, 483 U.S. ___, ___, 97 L.Ed.2d 56, 71 (1987), in his case based on a "reasoned *moral* response to [petitioner's] background, character, and crime." *California* v. *Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis in original). As petitioner now explains, both of these holdings affront the Eighth and Fourteenth Amendment requirement "of heightened reliability in death-penalty determinations through indi-

vidualized-sentencing procedures." *Shuman*, *supra*, 483 U.S. at ___, 97 L.Ed.2d at 72. Because neither conclusion can withstand constitutional analysis, petitioner's sentence must be set aside.

I

THE FORMER FACTOR (K) INSTRUCTION LIMITED THE SENTENCER'S CONSIDERATION OF MITIGATING EVIDENCE TO FACTORS EXTENUATING THE CRIME, THEREBY PRECLUDING THE JURY FROM GIVING MITIGATING EFFECT TO EVIDENCE OF PETITIONER'S BACKGROUND AND CHARACTER NOT IMMEDIATELY RELATED TO THE CIRCUMSTANCES OF THE CRIME IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

This Court has consistently required that a capital sentencer be allowed to consider a wide range of information concerning the defendant's background. As emphasized by a plurality in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), the Eighth and Fourteenth Amendments "require that the sentencer . . . not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (emphasis in original). Accord *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-114 (1982); *Skipper* v. *South Carolina*, 476 U.S. 1, 4-5 (1986). In a variety of contexts, the Court has refused to tolerate restrictions on the "sentencer's consideration of all mitigating evidence." *Mills* v. *Maryland*, 486 U.S. ___, ___, 100 L.Ed.2d 384, 394 (1988).

Thus in *Skipper*, when South Carolina argued that the defendant's evidence of his good behavior in jail could not properly be considered a mitigating circumstance because it postdated and was unrelated to the crime, the Court rejected this restrictive concept and held that character or background evidence is to be considered "mitigating" so long as it "might serve 'as a basis for a

sentence less than death.'" 476 U.S. at 4-5 (quoting *Lockett* v. *Ohio*, *supra*, 438 U.S. at 604). Accord, *Sumner* v. *Shuman*, *supra*, 486 U.S. at ___, 97 L.Ed.2d at 66, n. 5. In *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), a unanimous Court made plain its commitment to this principle by holding that the sentencing instructions and findings in a Florida case had unconstitutionally precluded consideration of such non-crime-related factors as evidence

> ". . . that as a child petitioner had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers." *Id.* at 397.

Subsequent cases reflect no erosion of the broad principle that all constitutionally relevant mitigating evidence must be given consideration and that non-crime-related circumstances are included within the scope of "relevant" factors. For example, the Court in *Penry* v. *Lynaugh*, 492 U.S. ___, 57 U.S.L.W. 4958 (June 26, 1989), while dividing on other issues, spoke with a single voice on this one. See *South Carolina* v. *Gathers*, 490 U.S. ___, ___, 104 L.Ed.2d 876, 887 (1989) (O'Connor J., joined by Rehnquist, C.J., and Kennedy, J., dissenting) ("[e]vidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so, . . . [because] it [i]s relevant to the jury's assessment of the defendant himself and his moral blameworthiness");[4] *Penry*, *supra*, 57 U.S.L.W. at

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[4] The evidence "extraneous to the crime" in *Gathers* was described by Justice O'Connor as follows:

"[T]he sentencing jury heard testimony from respondent's

4972-4973 (Scalia, J., joined by Rehnquist, C.J., White and Kennedy, JJ., dissenting) (noting that although a State may "'structur[e] or giv[e] shape to the jury's consideration of . . . mitigating factors,' . . . it may not affirmatively preclude a sentencer from considering mitigating evidence presented by a defendant [citing *Hitchcock* and *Skipper*]"). This settled rule was violated by the instructions in petitioner's case.

Petitioner's jury was instructed in conformity with the factors enumerated in subdivisions (a) through (k) of Cal. Penal Code § 190.3 (as listed in former CALJIC 8.84.1; see Appendix A). J.App. 33-34.[5] Nine of these 11 factors—whether aggravating, mitigating or neutral—bore exclusively upon the immediate circumstances of the crime itself. Cal. Pen. Code § 190.3, subds. (a), (d), (e), (f), (g), (h), (i), (j), (k). This includes all of the factors that can only be mitigating—(d), (e), (f), (g), (h), (j) and (k)[6] and one (factor (i), the defendant's age at the time of the crime) that can be aggravating, mitigating or neutral.[7] Factors

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mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. [Citation omitted.] Gathers' sixth grade teacher testified that he was a quiet and affectionate child but that he was not given sufficient guidance and discipline at home." 104 L.Ed.2d at 887.

[5] The California Supreme Court has interpreted this statutory list as exclusive, precluding evidence not probative of any specifically listed factor. *People* v. *Boyd*, 38 Cal.3d 762, 773-774, (1985). The court has approved the practice of reading each of the factors to the jury on the ground that it is for the jury to determine which factors are relevant or applicable in the individual case. *People* v. *Hernandez*, 47 Cal.3d 315, 364 (1988).

[6] See *People* v. *Hamilton*, 48 Cal.3d 1142, 1184 (1989).

[7] See *People* v. *Lucky*, 45 Cal.3d 259, 302 (1988). As the court subsequently explained, "mere chronological age by itself is not relevant to the appropriate penalty and is neither aggravating nor mitigating. *People* v. *Bean*, 46 Cal.3d 919, 952 (1988).

(b) and (c) were vehicles for evidence in aggravation not related to the immediate crime; the prosecution showed both prior criminal activity involving force or violence (factor (b)) and prior felony convictions (factor (c)). Thus there was simply no category of *mitigation* that the jury was permitted to consider that encompassed *non*-crime-related factors.

The remaining "catch-all" factor (k), as it formerly read, did not cure this deficiency. Factor (k), J.App. 34, directed the jury's attention to *"[a]ny other* circumstance which *extenuates the gravity of the crime* even though it is not a legal excuse *for the crime*." (Emphasis added.) There was accordingly no vehicle under the plain language of former CALJIC 8.84.1 instruction as given in petitioner's case for the jury to "consider and give effect to," *Penry* v. *Lynaugh*, *supra*, 492 U.S. at ___, 57 U.S.L.W. at 4965, petitioner's non-crime-related mitigating evidence "in rendering its sentencing decision." *Ibid.*

Not only would "'the specific language challenged,'" *California* v. *Brown*, 479 U.S. 538, 541 (1987), quoting *Francis* v. *Franklin*, 471 U.S. 307, 315-316 (1985), have been interpreted to preclude the jury's consideration of mitigating circumstances not immediately related to the crime, but the context within which the factor (k) instruction was given reinforced that meaning. Petitioner's jury was charged to consider a list of factors, from Cal. Penal Code § 190.3 (d) through (j), which repeatedly and consistently referred to "the time of the crime," "the offense," the "homicidal act," and the time that "defendant acted." Given that *each* specific *mitigating* factor was expressly focused on the crime itself, any reasonable juror would have concluded that the final catch-all category on that exclusive list—factor (k)'s "any other circumstance which extenuates the gravity of the crime," J.App. 34—had to be

similarly *related to the crime*. With no instruction anywhere telling the jury that petitioner's character and background evidence which was not related to the crime could be considered in mitigation, the jury would not have understood that it could.

And the prosecutor assiduously reiterated this limitation throughout the trial. During voir dire he emphasized that the list of aggravating and mitigating factors which the jurors would be given in the instructions defined and limited the way in which the sentencing-related evidence could be considered.[8] Thus, he explained that the list represented "the way the law is set up now, [and] it is a very strict structure." J.App. 9. "[W]hat they have done is created a lot of things to look at, about nine or 10 factors. And, essentially what you do is you take that evidence [and] plug it into the factors." *Id.* at 17. Thereafter, in his penalty-phase summation, the prosecutor reminded the jury of the list of factors our society "has given . . . to decide [penalty] upon." *Id.* at 28. He pointed out, "[y]ou have been given very clear guidelines, eleven of them, to direct your decision in this case." RT 4823:17-18.

With the jury committed to following these guidelines, the prosecutor proceeded to argue at the penalty phase of trial that petitioner's mitigating evidence was wholly irrelevant to the specific mitigating factors in the list and

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[8] This Court has recognized that the prosecutor's closing argument must be considered in relation to the jury's probable understanding of the instructions. See, e.g., *California* v. *Brown*, 479 U.S. at 546 (O'Connor, J., concurring). The Eleventh Circuit has, in a similar context, concluded that the prosecutor's comments during voir dire are also part of the context within which a reviewing court must examine the jury's probable understanding of instructions. See *Mann* v. *Dugger*, 817 F.2d 1471, 1483 (11th Cir. 1987), cert. denied, ___ U.S. ___, 103 L.Ed.2d 821 (1989).

even to the catch-all factor (k). Thus, after reading the factor (k) language to the jury, and observing that "we've heard a lot from his family, from psychologists as to why [petitioner] is the way he is now," the prosecutor asserted, "you are asked to consider whether what you have heard about this Defendant extenuates in any way the gravity of this crime, and I would suggest it does not." RT 4776-4777; J.App. 22-23. And later, he again argued in relation to factor (k), "If you look and you read what it says about extenuation, it says, 'To lesson the seriousness of a crime as by giving an excuse.' Nothing I have heard lessens the seriousness of this crime, nothing." RT 4824; J.App. 29. The California Supreme Court construed this argument as simply urging the jury to find that the mitigating evidence was insufficient to outweigh the aggravating evidence.[9] However, the prosecutor plainly was not addressing simply the relative weight of the evidence; he was arguing instead that none of petitioner's mitigating evidence fit within the factors listed in the instructions—not even the catch-all "any other factor"—because none of petitioner's evidence had anything to do with lessening the seriousness of the crime.[10]

Arrayed against the prosecutor's argument was the bland suggestion of defense counsel that petitioner's evi-

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[9] "Although the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence should not be considered." *People* v. *Boyde*, 46 Cal.3d at 251.

[10] See, e.g., the following portions of the prosecutor's summation:

"You can speculate for hours as to exactly why this man is the way he is . . . . [¶] "[N]othing that I have heard there relieves or extenuates in any way the seriousness of this particular crime." RT 4777; J.App. 23.

"Nor, I ask you, does this in any way relieve him or does that in any way suggest that this crime is less serious or that the gravity of the crime is any less; I don't think so." RT 4778; J.App. 24.

dence should be considered in mitigation even though it was not related to, and did not lessen the seriousness of, the crime itself. J.App. 26-27. However, in the overall context of the trial, this argument stood no chance of dissuading the jury from adopting the prosecutor's frame of reference, which confirmed—and was actually confirmed by—the instructions. *Penry* v. *Lynaugh*, *supra*, 492 U.S. at ___, 57 U.S.L.W. at 4964. Particularly in a context like this, the arguments of defense counsel "cannot substitute for [correct] instructions by the court." *Taylor* v. *Kentucky*, 436 U.S. 478, 488-489 (1978). Accord, *Carter* v. *Kentucky*, 450 U.S. 288, 304 (1981).

While the instructions and the prosecutor's arguments thus *would* have led the jury to understand that it could not consider as a mitigating factor any evidence that was unrelated to the crime, petitioner needs not show this much to prevail. He is required only to show that "[his] interpretation of the sentencing process is one a reasonable juror *could* have drawn from the instructions given by the trial court." *Mills* v. *Maryland*, ___ U.S. ___, ___, 100 L.Ed.2d 384, 394 (1988) (emphasis supplied). Accord *Sandstrom* v. *Montana*, 442 U.S. 510, 514 (1979); and see *Andres* v. *United States*, 333 U.S. 740, 752 (1948) (where "reasonable men might derive a meaning from the instructions given other than the proper meaning[,] . . . [i]n death cases [such] doubts . . . should be resolved in favor of the accused"). Within the context of petitioner's trial, a reasonable juror plainly "could" have interpreted the instructions as precluding consideration of non-crime-related mitigating evidence.[11]

[11] In fact, there is evidence here that other presumably "reasonable men" and women did "derive" an improper meaning from the former instruction. Amicus California Appellate Project has pointed out that prior to the California Supreme Court's decision in *People* v. *Easley*, 34 Cal.3d 858 (1983), it was the widespread practice of prosecutors and judges in California to interpret former factor (k) as precluding consideration of mitigating evidence unrelated to the crime. Brief of Amicus Curiae at 12-17.

Observing that petitioner's evidence at the penalty phase consisted of background and character evidence that was unrelated to the crime, the California Supreme Court implied that any instructional deficiency was cured by a separate portion of the charge that told the jury to consider "all of the evidence which has been received during any part of the trial of this case." *People* v. *Boyde*, 46 Cal.3d at 251. This reasoning was further supported by the court's view that the sheer volume of mitigating evidence and argument about it by defense counsel would have led the jury to consider the evidence: "[I]t is inconceivable the jury would have believed that, though it was permitted to hear defendant's background and character evidence, and his attorney's lengthy argument concerning that evidence, it could not consider that evidence." *Id.* at 251. This attempt to save the defective instructions fails on several counts.

First, this Court has recognized that a broad description of the evidence to be considered cannot cure a specific directive to consider that evidence only in relation to certain issues (such as whether it "extenuates the gravity of the crime"). See *Lockett* v. *Ohio*, *supra*, 438 U.S. at 608 (citing *State* v. *Bayless*, 48 Ohio St.2d 73, 86-87, 357 N.E.2d 1035, 1045-1046 (1976) (reviewing an instruction in an Ohio capital case which contained the same broad description of the evidence to be considered as here). Telling jurors to consider "all of the evidence" received during the entire trial does not countermand specific instructions defining the sole issues on which that evi-

dence is to be considered. Nor does it apprise jurors that factors beyond the scope of those issues—such as circumstances which do not extenuate the crime's gravity—nevertheless "might serve 'as a basis for a sentence less than death.'" *Skipper* v. *South Carolina*, *supra*, 476 U.S. at 5 (citing *Lockett* at 604).

Second, even if reasonable jurors could have understood the instruction about considering all sources of evidence as permitting them to give effect to mitigating circumstances unrelated to the crime, so construed, that instruction would have been directly in conflict with the explicit list of factors from (a) through (k) which the court read the jury in the very next breath. J.App.33. It would have been inconsistent, moreover, with the whole pattern of instructions concerning aggravating and mitigating circumstances which plainly limited the jury's consideration of aggravating evidence to the specifically-listed aggravating circumstances. See RT 4836:5-9. If the instruction to consider "all of the evidence" were construed to allow the consideration of *mitigating* factors *not* specified among the listed mitigating factors, the instruction would necessarily be construed as allowing untethered consideration by the jury of *aggravating* factors as well—a form of open-ended application which the California Supreme Court has held erroneous based on the exclusive nature of the list of statutory aggravating circumstances.[12] Furthermore, jurors told to consider only carefully defined circumstances on the one hand, and everything on the other, would necessarily (although understandably) be confused. At best, therefore, the California Supreme Court's interpretation of the directive to consider "all of the evidence" would produce a classic

[12] *People* v. *Boyd*, 38 Cal.3d 762, 772-775 (1985).

instructional conflict as to which it would be impossible to "conclude that the jury followed the [proper] . . . instruction" rather than the improper one. *Cabana* v. *Bullock*, 474 U.S. 376, 383, n. 2 (1986). See also *Francis* v. *Franklin*, 471 U.S. 307, 322 (1985) ("Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity").

Third, this situation is comparable to *Penry* v. *Lynaugh*, *supra*, in which mitigating evidence was presented and argued at length by defense counsel but the jury was nonetheless effectively precluded from giving effect to it by a limiting instruction. Here, as in *Penry*, the jury was effectively prevented from considering petitioner's proferred mitigation bearing on "compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion), and "relevant mitigating circumstances pertaining to the offense and a range of factors about [petitioner] . . . as an individual," *Sumner* v. *Shuman*, 483 U.S. at ___, 97 L.Ed.2d at 64.

In the setting of petitioner's case, this curtailment of the jury's power to consider mitigating circumstances had profound consequences. At the penalty phase of his trial, petitioner presented considerable mitigating evidence concerning his character and background in order to establish that, notwithstanding the gravity of his crime, his life should be spared. Testimony from his mother, two sisters, stepfather, ex-girlfriend and her mother, and his wife related the impoverished and destructive circumstances of petitioner's upbringing and the difficulties he experienced as a youth and thereafter as an adult. Raised

by his mother alone (she worked first as a farm laborer and afterward as a domestic) and fatherless—the evidence suggested that petitioner was obsessed with not knowing the father who had abandoned him—Richard Boyde had health problems virtually from birth. As a very young child, he developed psychological difficulties that adversely affected his performance in school and caused him to come into contact with the authorities. Efforts to obtain counseling through the school system were unavailing. According to a court-appointed psychologist, for much of petitioner's life he had suffered depression and feelings of low self-esteem and social inadequacy. Notwithstanding the harsh and embittered contours of his life, petitioner's former girlfriend and sister described him as "a giving person, good with children and good to them," *People* v. *Boyde*, *supra*, 46 Cal.3d at 249. Although he looked for work diligently after release from prison, he was unable to find it.

These mitigating circumstances could not have been considered and given mitigating effect, see *Penry* v. *Lynaugh*, *supra*, under the instructions in petitioner's case. In the first place, all of the mitigating circumstances established by petitioner's evidence—his impoverished and deprived childhood (in which he lacked physical and emotional sustenance); his inadequacies as a school student; his difficulties in making a satisfactory adjustment on a social, intellectual, and emotional level; and, in the face of these obstacles, his strength of character (shown by his efforts to be generous, to be kind to children, and to be a good husband, notwithstanding the difficulties of his daily life)—are wholly irrelevant to, and thus could not have been considered under, any of the specifically listed mitigating circumstances on which his jury was instructed. None of petitioner's mitigating circumstances

revealed that he had an "extreme mental or emotional disturbance" at the time of the offense, Cal. Penal Code § 190.3(d); that the victim in any way participated voluntarily in the offense, § 190.3(e); that the offense was committed on the basis of a reasonable sense of moral justification, § 190.3(f); that petitioner acted under "extreme duress" or the "substantial domination of another," § 190.3(g); that his mental or emotional disabilities impaired his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" at the time of the offense, § 190.3(h); that he was too young or too old at the time of the offense to spare his life, § 190.2(i); or that his participation in the offense was "relatively minor," § 190.3(j). The mitigating circumstances established by Mr. Boyde's evidence simply had nothing to do with these statutorily-enumerated factors.

Similarly, petitioner's mitigating evidence could not be considered under catch-all factor (k) because none of it, in any logical sense, could have "extenuated the gravity of the crime." Indeed, the mitigating circumstances were in no way connected to the crime or to his mental state at the time of its commission. These mitigating circumstances, rather, had to do with the person Richard Boyde, an individual, who grew up in poverty and extreme hardship, who lived with emotional and intellectual deficits which made everyday-life difficult, and who struggled against these odds to relate in positive ways with other human beings. Going solely to petitioner's character, these factors shed no light on why he committed the particular crime for which he was on trial; this mitigating evidence did not at all "suggest that [his] . . . crime is less serious or that the gravity of the crime is any less," as the prosecutor pointedly told the jury in closing argument. RT 4778; J.App. 24. *None* of these mitigating circumstances, in short, extenuated the gravity of the crime.

These mitigating circumstances did, however, provide a reason "why a death sentence . . . should not be imposed," *Jurek* v. *Texas*, 428 U.S. 262, 271 (plurality opinion). They revealed a person of worth, who struggled against more hardships than most other people have to face, who sometimes overcame them and who sometimes did not. They revealed a person in whom the human spirit was alive and whose faltering quest for human dignity called for compassionate understanding rather than unforgiving retribution. Petitioner's mitigating circumstances were in these respects indistinguishable from the non-crime-related mitigating circumstances in *Hitchcock*, *Skipper*, and *Penry*. Their exclusion from the jury's sentencing deliberations accordingly "risks erroneous imposition of the death sentence, in plain violation of *Lockett*," *Mills* v. *Maryland*, 100 L.Ed.2d at 394 (citing *Eddings* v. *Oklahoma*, 455 U.S. at 117 (O'Connor, J., concurring)). This risk is one that the Court has never found tolerable in a death case. It should not be tolerated here.

II

THE FORMER INSTRUCTION REQUIRING A VERDICT OF DEATH WHENEVER AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES PRECLUDED THE JURY FROM MAKING A REASONED MORAL JUDGMENT REGARDING THE APPROPRIATENESS OF THE DEATH PENALTY FOR PETITIONER, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Petitioner's jury was instructed that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." J.App. 35. This instruction reduced the determination of petitioner's sentence to a mechanistic weighing process that foreclosed the "individualized assessment of the

appropriateness of the death penalty" required by the Eighth and Fourteenth Amendments, *Penry* v. *Lynaugh*, *supra*, 492 U.S. at ___, 57 U.S.L.W. at 4962.

A. The Constitutional Requirement Of An Individualized Determination That Death Is The Appropriate Sanction In Each Particular Case Is Violated By A Procedure That Makes The Sentence Depend Solely On Whether Aggravating Circumstances Outweigh Mitigating Circumstances

The constitutional prohibition of mandatory capital sentencing in 1976 was premised on the respect for human dignity embodied in the Eighth Amendment, which requires recognition of the uniqueness of each individual case for the purpose of determining the appropriateness of the extreme punishment of death. *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). Since that time, the "constitutional mandate of individualized determinations in capital-sentencing proceedings" has become a central feature of this Court's Eighth Amendment jurisprudence. *Sumner* v. *Shuman*, *supra*, 483 U.S. at ___, 97 L.Ed.2d at 65.

Lockett v. *Ohio* exemplifies that principle but does not exhaust it. See, e.g., *Mills* v. *Maryland*, *supra*, 100 L.Ed.2d at 394; *Penry* v. *Lynaugh*, *supra*. In order "to determine whether the death sentence is the appropriate sanction in any particular case," *Shuman*, *supra*, 97 L.Ed.2d at 67; *Woodson*, *supra*, at 305, a capital sentencer must be permitted to give "significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense . . . . ." *Ibid.* See also *Lockett*, 438 U.S. at 604; *Skipper* v. *South Carolina*, 476 U.S. at 4-5; *Shuman* at 64-70; *Franklin* v. *Lynaugh*, 487 U.S. ___, ___, 101 L.Ed.2d 155, 172-173 (1988) (O'Connor, J., joined by Blackmun, J.,

concurring). The sentencing decision must "rest on a far-reaching inquiry into countless facts and circumstances," *Zant* v. *Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring), and the sentencer must be "free to consider a myriad of factors . . .," *California* v. *Ramos*, 463 U.S. 992, 1008 (1983). The sentencer must be allowed to "give effect to" its consideration of this myriad of factors by imposing whichever sentence it views as "the appropriate punishment." *Franklin* v. *Lynaugh*, 101 L.Ed.2d at 172-173 (O'Connor, J., joined by Blackmun, J., concurring).

Thus, this Court has repeatedly recognized that the constitutional bottom line regarding the sentencer's choice of penalty is whether "death is the appropriate sentence" under all of the evidence. *Penry* v. *Lynaugh*, 57 U.S.L.W. at 4962.[13] In this way, "'the sentence imposed should reflect a reasoned *moral* response to the defendant's background, character, and crime.'" *Franklin* v. *Lynaugh*, 101 L.Ed.2d at 172 (concurring opinion) (quoting *California* v. *Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis in original)).

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[13] Accord, *Woodson*, 428 U.S. at 305 (plurality opinion of Stewart, Powell, Stevens, JJ.) (discussing the constitutional need for reliability in "the determination that death is the appropriate punishment in a specific case"); see also *McCleskey* v. *Kemp*, 481 U.S. 279, 310, n. 32 (1987) (the purpose of a sentencer's broad discretion is to decide whether or not "'death is "the proper penalty" in a given case,'" (quoting *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968)); *Booth* v. *Maryland*, 482 U.S. ____, 96 L.Ed.2d 440, 451 (1987) (sentencer's "constitutionally required task [is] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime"); *Sumner* v. *Shuman*, 97 L.Ed.2d at 67 (capital murder statute provides inadequate basis "to determine whether the death sentence is the appropriate sanction in any particular case").

The instruction in petitioner's penalty trial required the jury to impose death if it found that the aggravating circumstances outweighed the mitigating circumstances. The determination that aggravation outweighed mitigation was thus substituted for the jury's "reasoned moral response" to Mr. Boyde's background, character, and crime. The constitutional problem with this is that the "reasoned moral response" contemplated by the Eighth Amendment does not rest solely upon the sentencer's weighing of aggravating and mitigating circumstances against each other. The making of a reasoned moral response certainly takes into account the balance of aggravating and mitigating circumstances, but it must take into account *more* than this if the sentencing decision is to be individualized. It is the mandatory capital sentencing instruction's preclusion of the sentencer's consideration of these other matters which is its constitutional flaw.

One of the matters precluded from consideration is an assessment of the absolute weight of the aggravating circumstances. In *Sumner* v. *Shuman*, *supra*, the Court recognized that every aggravating circumstance is not of equal weight, and further, that even the same statutory aggravating circumstance will have different weight in different cases. Focusing on a particular aggravating circumstance in *Shuman*, "[p]ast convictions of other criminal offenses," the Court explained that "[this circumstance] can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder, but the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense." 97 L.Ed.2d at 69.

Certainly the same can be said as to any aggravating circumstance or collection of aggravating circumstances:

their absolute aggravating weight—how strongly they will call for the death sentence as the appropriate sentence—will vary from case to case. An individual's moral culpability cannot, therefore, be measured simply by reference to the fact that there are aggravating circumstances associated with his background, character, and crime. The presence of particular aggravating circumstances merely establishes the murder as a particular category of murder, but "'individual culpability is not always measured by the category of the crime committed.'" *Roberts (Stanislaus)* v. *Louisiana*, 484 U.S. 325, 333 (1976) (quoting *Furman* v. *Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting)). To make a "'reasoned *moral* response to the defendant's background, character, and crime,'" *Franklin* v. *Lynaugh*, *supra*, 487 U.S. at ___ (opinion concurring in judgment), the sentencer must undertake an assessment of whether the absolute weight of the aggravating circumstances were simply insufficient in themselves to warrant a sentence of death.

If the capital sentencer is only allowed to assess the relative weight of the aggravating circumstances—i.e., their weight in relation to mitigating circumstances—as the jury was in petitioner's case, there is thus a risk that death will be imposed even though the aggravating circumstances are themselves "insufficiently weighty to support the ultimate sentence." *Barclay* v. *Florida*, 462 U.S. 939, 964 (1983) (Stevens, J., joined by Powell J., concurring). The fact that aggravating circumstances outweigh mitigating circumstances does not establish that the aggravating circumstances themselves are enough to warrant the imposition of death. A "reasoned moral" judgment should be made about this, but in petitioner's case the instruction foreclosed that assessment. The

direction to impose death if the aggravating circumstances outweighed the mitigating circumstances thus precluded the jury's consideration of the absolute weight of the aggravating evidence, and prevented the jury from finding those aggravating factors *weighty enough* to require the death penalty.

The second matter precluded from consideration by the mandatory sentencing instruction is the sentencer's judgment, based on the totality of the aggravating and mitigating evidence, of whether death is the appropriate sentence. The need for an overall judgment of the individual has long been recognized as the core of the constitutional objection to any mandatory capital sentencing scheme. In *Woodson*, for example, the plurality noted that the Court had for many years "commented upon our society's aversion to automatic death sentences," 428 U.S. at 296 (citing *Winston* v. *United States*, 172 U.S. 303 (1899)). And in *Winston* itself, the Court made clear that the capital sentencer always retains the discretion to decide that death is not the "just or wise" sentence in view of the totality of the evidence:

> "The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of the opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of [the] opinion that it would not be just or wise to impose capital punishment." 172 U.S. at 313.

Thus, when Justice O'Connor wrote in *California* v. *Brown* that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime," 479 U.S. at 545 (emphasis in original), she was building upon a foundation

that was nearly a century old, on the basis of which the jury always retains the discretion to make a unique moral judgment on the whole of the evidence—to determine whether the death sentence for the particular individual before them is "just or wise."[14]

When the instructions reduce the jury's sentencing discretion, as in petitioner's case, to consideration of whether aggravating circumstances outweigh mitigating circumstances, the ability to make this kind of moral judgment is put in jeopardy. Particularly where, as here, the instructions did not further explain to petitioner's jurors in any respect that their "weighing" discretion must reflect their judgment, based on all the evidence, as to whether death or life was the "just or wise" sentence, there is a substantial risk that the jury's weighing determination did not reflect a "reasoned moral response" to the whole of the evidence before them. Without such additional instruction, there is a very real possibility that the jury would perceive its sentencing role in the way that the dissenters in the California Supreme Court found Mr. Boyde's jury had likely perceived its role:

> "[I]t was not their responsibility to decide whether or not they personally believed that death was the appropriate punishment[;] . . [they] were told that, under the law, they were only to decide whether aggravation outweighed mitigation without regard to their personal view as to the appropriate penalty. *People* v. *Boyde*, 46 Cal.3d at 265 (Arguelles, J., dissenting).

The damage which is thus done to a capital defendant's right to an individualized sentencing decision by the kind

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[14] See also *Woodson*, *supra*, at 304 (necessary to consider both the offender and the offense to arrive at "a just and appropriate sentence").

of mandatory death sentence instruction given in petitioner's case can be readily illustrated. One can imagine a case —petitioner's is an example—in which the aggravating circumstances, though substantial, do not demand the death penalty instead of a life sentence without parole. If asked whether, on the basis of the aggravating circumstances alone, the defendant should be sentenced to death, a juror might well say, "I am not certain. I feel divided about it. I am open to being persuaded. At the least, I will have to give it more thought." The juror, in short, has not determined aggravation is sufficiently weighty as to compel a capital sentence. If, however, the jury were then instructed as petitioner's jury was, and it found that the aggravating circumstances outweighed the mitigating circumstances—as obviously could happen—the death sentence would *have* to be imposed. The sentence would be imposed in this instance, however, without the sentencer having been required to determine, and without the sentencer having determined, whether the aggravating circumstances were themselves weighty enough to make death the appropriate sentence.

There is also, as discussed above, another way in which instructions that require a death verdict when aggravating factors outweigh mitigating factors would preclude a jury from expressing its reasoned moral response to the evidence. One can imagine a scenario where the defendant has presented mitigating evidence which, though not insubstantial, is not compelling. In such a case, a juror might say: "Considering the aggravating circumstances, I believe this to be a bad enough crime that I am seriously willing to consider the death penalty. Now, let's see what the defendant has to say for himself." Once again, the juror may find that aggravation outweighs mitigation and, under the court's instructions, be required to vote for death. Yet the juror has never been required to decide whether, when all of the evidence is considered together, death is the just and appropriate punishment. Even though—when viewed through the narrow perspective of whether the aggravating circumstances outweighed the mitigating circumstances—the juror could be confident

that the aggravating circumstances were weightier, the juror's underlying equivocation about whether the aggravating circumstances alone compelled a death sentence could well have become a determination that death was *not* appropriate if the mitigating circumstances had been brought into the calculus. Only, however, if the instructions further told the jury to consider on the basis of all the evidence whether death was the *proper* sentence would the juror have been called upon to make this kind of judgment. But if the jury in this hypothetical case had been instructed in the same way as petitioner's jury, the juror would not have been directed to make *this* judgment.

That there is a fundamental difference between the mere weighing inquiry called for by petitioner's instructions and the inquiry into whether death is the proper sentence on the basis of the whole evidence has been further illustrated in the Amicus Curiae Brief filed by the California Appellate Project (CAP). Amicus examines a period of time in which capital sentencing juries in Alameda County were given instructions that allowed their separate consideration of whether aggravating outweighed mitigating circumstances *and* whether death was the appropriate sentence. CAP Amicus Brief, at 26-29. In 19 capital sentencing trials conducted in the Alameda County Superior Court from 1983-1988, the sentencing jury (1) was instructed that even if aggravation outweighed mitigation, it could return a sentence of life imprisonment without parole and (2) was given four alternative verdict forms that allowed the jury to specify both its choice of sentence and its determination as to whether aggravation outweighed mitigation. Of those 19 sentencing trials, the jury found that aggravation outweighed mitigation in 15 cases; nevertheless, in more than half of the 15 cases in which aggravation outweighed mitigation, the jury determined that life-without-parole, not death, was the appropriate punishment. These eight "LWOP" verdicts could not have occurred unless the jurors in those cases recognized that a finding that aggravation outweighs mitigation was substantially different from an

individualized determination that death is the appropriate punishment in the specific case before them.[15]

For these reasons, the mandatory death sentence instruction in petitioner's case precluded his sentencing jury from making a reasoned moral judgment about the appropriateness of death as punishment for him.

B. The Challenged Instruction Was Not Saved, But Rather Was Exacerbated, By The Prosecutor's Argument To The Jury

In reviewing petitioner's case, the California Supreme Court followed the practice it first articulated when it prospectively modified former CALJIC No. 8.84.2 in *People* v. *Brown*, 40 Cal.3d 512: "Each such prior case must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." *Id.* at 544 n.17. In petitioner's case, the court concluded that petitioner's jury was "adequately informed as to its discretion in determining whether death was the appropriate penalty," *People* v. *Boyde*, 46 Cal.3d 212, 253. The majority found that the prosecutor's argument to the jury provided sufficient assistance to the

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[15] In *Spaziano* v. *Florida*, 468 U.S. 447, 464 (1984), the Court made clear that there is no one constitutionally-required procedure that states must use "to set up its capital sentencing scheme." Nothing in petitioner's argument suggests to the contrary. The California Supreme Court, of course, had no difficulty correcting the problem with the former mandatory instruction, *People* v. *Brown*, *supra*, 49 Cal.3d 512, and other jurisdictions have resolved related problems with similar ease. See, e.g., *State* v. *McDougall*, 301 S.E.2d 308, 327-328 (N.C. 1983) (responding to *Smith* v. *North Carolina*, 459 U.S. 1056 (1982), opn. of Stevens, J., respecting denial of certiorari); *State* v. *Ramseur*, 524 A.2d 188 (N.J. 1987).

jurors to prevent their misguidance. In doing so, the court erred in two fundamental ways.

First, it ignored the teaching of *Taylor* v. *Kentucky*, 436 U.S. 478 (1978). While the arguments of counsel are deemed relevant to the determination of whether a reasonable juror could have understood a truly ambiguous instruction in a particular way, there is an important limitation on the relevance of counsel's argument when the instruction is clear on its face: "[A]rguments of counsel cannot substitute for [correct] instructions by the court." *Taylor, supra*, at 488-489; *Carter* v. *Kentucky*, 450 U.S. 288, 304 (1981). Thus, if the judge's charge is equally susceptible to several interpretations, the arguments of counsel which encourage one interpretation are relevant. However, if the instruction is *not* susceptible to a particular interpretation, the arguments of counsel in favor of that interpretation cannot save the charge. After all, if a contradictory *instruction* cannot cure a constitutionally defective jury charge, *Cabana* v. *Bullock*, *supra*, 474 U.S. at 383, n. 2; *Francis* v. *Franklin*, *supra*, 471 U.S. at 322, then a mere argument of counsel cannot cure it.

The California Supreme Court ignored this important principle. The instruction at issue here was straightforward: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a death sentence." J.App. 35; RT 4836. Without some further guidance from the trial judge, this instruction was not susceptible to an interpretation compatible with the Constitution.

Here there were no instructions explaining the process of deliberation other than the challenged instruction. The jury was not instructed that the weight assigned to the various aggravating and mitigating factors should reflect

its view of the appropriateness of death as a penalty. Nor was it instructed that the words "shall impose a death sentence" were to include the proviso "only if you believe death is the appropriate sentence."

In short, the trial court left the jury with one clear instruction telling it that a death sentence was required if aggravation outweighed mitigation. The jury would have seen its task of weighing aggravating and mitigating factors as no more than a factfinding function. In finding the facts in aggravation and mitigation, and in balancing the facts against each other, the jury would have carried out its task without ever considering whether the aggravating factors alone, or whether the evidence viewed as a whole, sufficiently called for the death penalty that it should be imposed.

In view of the clarity of the challenged instruction, and without further interpretive assistance from the court, even the best and most lucid argument by counsel could not under *Taylor* have saved the charge.

The second way in which the California Supreme Court erred in relying on the arguments of the prosecutor is equally telling. For even if a prosecutor's argument could in some cases cure a defective instruction, the arguments of the prosecutor at petitioner's penalty trial did not cure the problems with the instruction challenged here; rather, they exacerbated them.

While some of the prosecutor's comments implied that each part of the jury's task was to be informed by its view of the appropriateness of the death sentence for petitioner, those comments were not at all clear. Moreover, most of the prosecutor's comments reinforced the unconstitutional understanding of the jury's task which the instruction itself imparted. Thus, even with the pros-

ecutor's comments, a reasonable juror in petitioner's case still would have believed that his only task was to find the facts in aggravation and mitigation, to weigh them against each other, and to sentence petitioner in strict compliance with the outcome of the weighing process—without ever considering whether death was the proper sentence on all the evidence, or indeed, despite his belief that on all the evidence death was not the proper sentence.

The California Supreme Court believed that two areas of prosecutorial argument saved the instruction in petitioner's case. First, the prosecutor, joined by defense counsel, repeatedly told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. They also made it clear that the jury was free to assign whatever weight it wanted to any particular factor. *People* v. *Boyde*, 46 Cal.3d at 253. To the court, these arguments informed the jury that it had the discretion to decide the appropriate penalty: "Obviously, when jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they necessarily understand they have discretion to determine the appropriate penalty." *Ibid.*

However, nothing within this argument informed the jury that, in the assignment of weight to the aggravating circumstances, the jury should be concerned with whether these circumstances were themselves sufficiently substantial to call for the death sentence. Nor did any aspect of the argument inform the jury that its assignment of relative weight to the aggravating and mitigating circumstances should reflect its view, based on all the evidence, of whether death should be the punishment. Thus, while the arguments of counsel may have informed the jury of its absolute discretion to assign weight to the

enumerated factors, the arguments did not inform the jury that its discretion to determine punishment should ultimately be informed by the underlying principle that death should be imposed only if the aggravating circumstances, when discounted by the mitigating circumstances, were sufficiently weighty to require imposition of the death penalty.

The California Supreme Court also relied on two comments by the prosecutor that urged the jury to make its weighing decision with an eye toward whether a death sentence was warranted:

> ["H]e . . . told the jury that its ultimate determination was: 'Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty.' [And] [i]n his final summation, the prosecutor stated, 'and the point now becomes, and the only question is, should it [the death penalty] be or should it not be imposed.' 46 Cal.3d at 253.

While out of context, these comments might be seen as urging the jury to take the constitutionally appropriate approach to the sentencing decision, in context, they plainly failed to do so.

In context, the prosecutor repeatedly taught the jurors, from voir dire to the rebuttal closing argument of the penalty trial, that the law created a rigid framework for their sentencing decision—a framework composed of "nine or ten" factors which would dictate the proper sentence. See J.App. 9, 14-15, 17, 21, 28, 30. Repeatedly, the prosecutor explained in voir dire that the jury findings within this rigid framework must dictate the sentence, not the juror's sense of the appropriate punishment. Thus, for example, the prosecutor explained to Edward Armas, who became the foreperson of the jury:

> "And I believe it is quite possible that you, personally, if you were writing on a blank slate or writing the law yourself would, in a particular case, not think the death penalty appropriate, but yet the law says that it is." J.App. 9.

And in a colloquy with another juror, Joan Breeding, the prosecutor taught her to "understand that the decision isn't based on where I think it is appropriate." J.App. 7.

To juror Donna Ash, the prosecutor declared:

> It [the framework for the sentencing decision] might mean, 'well, I don't think this crime deserves the death penalty,' yet as you look at what the factors are, you may be required to return a penalty of death." J.App. 18. See also *Id.* at 14.

In the penalty phase closing arguments, these themes were reiterated and an important element added. Thus, the prosecutor argued, consistent with his voir dire,

> [Y]ou have to understand this is not a personal decision, it is not a situation where we toss the case to you and say, 'Hey, how do you feel today, do you want to impose the death penalty or not? . . . What we said to you is here is the rule of law, here is the evidence, please apply the evidence to the rules of law and make a decision based upon what the law requires of you, same process that you went through in deciding guilt.
>
> "You are deciding the just punishment according to law. You're not deciding whether I like him, don't like him, whether it's my decision to impose the death penalty.
>
> "You have been given very clear guidelines, eleven of them, to direct your decision in this case. You have taken an oath that you would be willing to do that, and that's what you have to do." RT 4823.

Earlier the prosecutor had defined for the jury what the law required:

> [T]he test is whether aggravating outweighs mitigating or mitigating outweigh aggravating. . . .
>
> "If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." J.App. 20-21.

Thus, in context, the prosecutor conditioned the jurors to believe that their own judgment about the appropriateness of the death sentence—even though it could properly have been "a reasoned *moral* response to the defendant's background, character, and crime," *California* v. *Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis in original)—was irrelevant. Their judgment was to be subordinated to the law's expectation (as he repeatedly defined it), and that expectation was exceedingly limited: to find the aggravating and mitigating circumstances, to weigh them, and to impose death even if the aggravation only "slightly" outweighed the mitigation. In this context, the prosecutor's argument that the "only question" for the jury to decide was, "should [the death penalty] be or should it not be imposed," meant very little. It could hardly be expected to evoke the jurors' "reasoned moral response" which the prosecutor had already consigned to oblivion.

Accordingly, neither the instructions nor the argument of counsel accurately or clearly informed the jury of the duties it must perform in order to come to an individualized sentencing decision in Mr. Boyde's case. Without question, a reasonable juror would have believed that his or her task was merely to determine the relative balance of aggravating and mitigating circumstances and to impose death if the aggravating circumstances preponde-

rated—even though he or she also believed, on the basis of all the evidence, that death was an inappropriate sentence for petitioner.

In any event, as previously noted, the test of an instruction is whether "a reasonable juror could have drawn from the instructions" an understanding of the sentencing process which conflicts with constitutional requirements. *Mills* v. *Maryland*, 100 L.Ed.2d at 394. Although in some instances an instruction may be so clear in its explicit language and in context that any reasonable juror would understand the instruction in a way that conflicts with the Constitution, the test is merely whether a reasonable juror "could"—not "would"—have such an understanding. Without question, in *this* case a reasonable juror would have believed that his or her task was merely to determine the relative balance of aggravating and mitigating circumstances and to impose death if the aggravating circumstances preponderated—even though he or she also believed, on the basis of all the evidence, that death was an *in*appropriate sentence for petitioner. The resulting judgment therefore plainly violated the Eighth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California affirming petitioner's sentence of death should be reversed.

Respectfully submitted,

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APPENDIX A

APPENDIX A

(FORMER INSTRUCTION)

*** CALJIC 8.84.1**

PENALTY TRIAL—FACTORS FOR CONSIDERATION

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

(PRESENT INSTRUCTION)

CALJIC 8.85

PENALTY TRIAL—FACTORS FOR CONSIDERATION

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle].

APPENDIX B

APPENDIX B

(FORMER INSTRUCTION)

*** CALJIC 8.84.2**

PENALTY TRIAL—CONCLUDING INSTRUCTION

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [each] defendant.

You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

[In this case you must decide separately the question of the penalty of each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] [all] defendants, but do agree as to the penalty of one [or more] of them, you must render a verdict as to the one [or more] on which you do agree.]

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it to this courtroom.

(PRESENT INSTRUCTION)

CALJIC 8.88

PENALTY TRIAL—CONCLUDING INSTRUCTION

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [the] [each] defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

[In this case you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] [all] defendants, but do agree on the penalty as to one [or more] of them, you must render a verdict as to the one [or more] on which you do agree.]

You shall now retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.